

**DECISION**

12445 J. Vickers  
Proc I  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-195520.2**DATE:** January 7, 1980**MATTER OF:** Keco Industries, Inc.**DIGEST:**

CNG 00151

Bid was properly rejected as nonresponsive under IFB requiring level pricing of items for different program years where bidder telegraphically reduced prices offered for first year but left second-year prices for some items unchanged resulting in violation of level pricing clause. Because of closeness of other bids received, bid may not be corrected due to possible prejudice to other bidders which bid in conformance with IFB requirements.

Keco Industries, Inc. (Keco), has protested the rejection of its bid as nonresponsive to invitation for bids (IFB) No. DAAJ09-79-B-5027 issued by the United States Army Troop Support and Aviation Materiel Readiness Command.

AGC 00917

The IFB was for two types (50/60 HZ and 400 HZ) of 18,000-BTU vertical compact air conditioners and was a 50-percent small business set-aside. The IFB permitted bids on a single-year basis (Alternate A) or on a multiyear basis (Alternate B), but warned bidders that if a bid was submitted on Alternate B, the unit prices for the same item had to be the same for all program years.

Bid opening was held on July 24, 1979. Keco's bid, dated July 19, 1979, was telegraphically modified in a timely manner on July 24 by reducing its offered price by \$150 per unit on various items under the first year of the multiyear alternate. However, no corresponding price reduction was made for the same items for the second program year. The July 24 telegram also noted that "no other changes to our bid are made or intended."

*Schmitt  
Bid errors  
Small business set aside  
Bidder nonresponsive*

[Protest Against Bid  
Rejection]

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Because of this telegraphic modification, Keco was now offering different prices for the same items for different program years, in contravention of the terms of the IFB. On July 26, 1979, after bid opening, Keco corresponded with the contracting officer and contended that it had inadvertently failed to reduce its price \$150 per item for the second program year items and requested that its bid be corrected to reflect this change.

On August 22, 1979, the contracting officer determined Keco's bid to be nonresponsive because of its failure to bid level prices for all items for all program years and the fact that the July 26 message from Keco could not be considered since it was submitted after bid opening.

Keco argues that its bid was acceptable because it was responsive on its face as submitted on July 19, 1979, and modified by the July 24, 1979, telegram or, in the alternative, that the bid is within the pricing pattern exception, stated in 52 Comp. Gen. 604 (1973), to the general rule that the failure to bid on every item renders a bid nonresponsive.

Concerning the first contention, Keco states that its bid, as originally submitted, included level prices for all items under Alternate B. Since Keco took no exception to the level pricing clause, it was bound to furnish the second program year items at the same price as the first year and, therefore, the contracting officer should have extended the revised prices contained in the July 24 telegram to the second program year items in view of the level pricing clause.

8 Keco's argument is based on the premise that in order to take exception to a clause in a solicitation, a bidder would have to clearly refer to the clause in its bid and state that it refuses to be bound by the clause. This is not the test since a bid's responsiveness is determined by whether a bidder has unequivocally offered to strictly conform to the essential terms and specifications of the IFB, and must be determined from the face of the bid itself at the time of bid

opening. Delora Haidle, B-194154, April 6, 1979, 79-1 CPD 243. Considering the bid as submitted and the timely telegraphic modification, the level pricing clause was not complied with and Keco's bid must be determined nonresponsive.

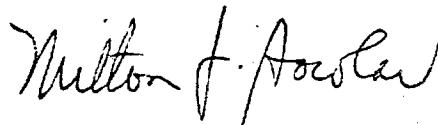
Regarding Keco's alternate argument, we do not find the holding in 52 Comp. Gen. 604 (1973) to be applicable to the instant factual situation. In the 1973 decision, an offeror, on the second step of a two-step procurement, failed to include a price for one of four follow-on quantities after bidding the same price for the basic quantity and the other three follow-on quantities. We found that because of the consistent pricing pattern and the fact that the intended bid could be established from the bid itself, the bid could be corrected. However, that decision also noted that the above rule was applicable because there was no clear and convincing evidence that the bidder intended a price different than the one established under the pricing pattern. Here, Keco had inserted a price for the second year, which remained unchanged following the telegram, and which violated the level pricing clause. Therefore, 52 Comp. Gen. 604 is distinguishable and, likewise, the other pricing pattern cases cited by Keco.

The crucial question presented is the possible prejudice to other bidders as explained in Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD 301, and ABL General Systems Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318. Both of these cases involved a similar level pricing clause and, in Keco, the prices were such that another bidder, even if it had bid in an uneven manner as did Keco, would not have been low. In ABL, the bid prices were so close that the violation of the level pricing clause by ABL could have prejudiced other bidders who may have bid lower if they had bid different prices for different items. See also 44 Comp. Gen. 581 (1965).

Here, for the 50/60 HZ air conditioners, Keco's evaluated bid, considering only the reduction for the first year, is 5 percent lower than the successful bidder's bid on the first year, 2 percent higher on the

second year and less than 2 percent lower overall. On the 400 HZ air conditioners, Keco is 6 percent lower on the first year, 1 percent lower on the second year and 4 percent lower overall. Because of this closeness of bidding, the application of ABL, supra, requires the rejection of Keco's bid as nonresponsive in view of the possible prejudice to other bidders.

Accordingly, the protest is denied.

A handwritten signature in cursive script, reading "Milton F. Fowler".

For The Comptroller General  
of the United States